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8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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11 NICHOLAS VOVOS,

12 Plaintiff,

13 v.

14 D. MARTINEZ,

15 Defendant.  
16

No. 2:21-CV-0837-KJM-DMC-P

FINDINGS AND RECOMMENDATIONS

17 Plaintiff, a prisoner proceeding pro se, brings this civil rights action under 42  
18 U.S.C. § 1983. Pending before the Court is Defendant's unopposed motion to dismiss, ECF No.  
19 26.

20 On June 8, 2021, the Court issued an order addressing the sufficiency of Plaintiff's  
21 complaint. See ECF No. 9. The Court summarized Plaintiff's allegations as follows:

22 Plaintiff names the following as defendants: (1) D.  
23 Martinez; (2) John Doe #1; (3) John Doe #2; (4) John Doe #3; and (5) Sgt.  
24 Phillips. See ECF No. 1, pg. 1. According to Plaintiff, the events giving  
rise to the complaint occurred at California State Prison – Sacramento  
(CSP-Sac.). See id. Plaintiff presents two claims.

25 In his first claim, Plaintiff alleges Defendants D. Martinez  
26 and John Doe #1 unnecessarily restrained Plaintiff in waist and leg irons  
with the knowledge that Plaintiff has a medical condition that causes him  
to lose his balance and prevent him from catching himself. See id. at 11.  
27 According to the complaint, Plaintiff was scheduled for a medical  
appointment and escorted by Defendants Martinez and Doe #1. See id.  
28 Plaintiff claims he nearly fell when Martinez placed the chains on him and  
Plaintiff informed Defendants about his carpal tunnel and the pinched

1 nerve in his back. See id. at 6-7. Plaintiff claims Martinez assured him  
2 that Martinez and Doe #1 would “have a hold of him as long as he was in  
leg-irons.” Id. at 12.

3 Plaintiff claims he was then escorted to Holding Room #3  
4 in Building-56, where Martinez instructed Plaintiff to sit until his  
appointment. See id. at 8. Plaintiff states that he informed Defendants of  
5 his concern that the room was unsanitary and, if he were left in the room  
alone, that he would be unable to protect himself if he fell in his restraints.  
6 See id. at 12. Plaintiff claims his concerns “were not taken seriously” and  
that Martinez “summoned Plaintiff to the door to grab a wet towel to clean  
7 the table” with the knowledge that Plaintiff has trouble standing on his  
own. Id. at 13. Plaintiff alleges that when he stood up, his leg chain caught  
8 on a bolt that anchored his stool to the cement. See id. at 10. Plaintiff  
claims he hit the floor and “split[] the skin above his left temple wide  
open, swelling his left eye partial closed, and severely bruised.” Id.

9 Accompanying Plaintiff’s complaint are copies of form  
“CDCR 7219,” also known as medical report of injury, from March 23  
10 and March 26, 2021. The March 23 form reports active bleeding and a  
laceration on the left side of Plaintiff’s face. See ECF No. 1, Ex. A., pg. 1.  
11 The March 26 form reports nine stitches and four dark brown spots around  
the laceration. See id. at 2. Plaintiff alleges that his injury was not properly  
documented. See id.

12 In his second claim, Plaintiff alleges that on March 26,  
2021 – three days after Plaintiff’s fall – Plaintiff was denied photographs  
13 of his injuries and the opportunity for a taped interview to document the  
incident. See id. at 16. Plaintiff claims his request was denied when  
14 Defendant Phillips learned the evidence would be used for a complaint  
against Defendants. See id. at 17. Plaintiff alleges that Phillips attempted  
15 “to interfere and/or obstruct Plaintiff from obtaining material evidence to  
bring civil litigation.” Id.

16 ECF No. 9, pgs. 2-3.

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18 The Court concluded that Plaintiff’s complaint states a cognizable Eighth  
19 Amendment claim against Defendant Martinez based on the alleged use of excessive force and  
20 deliberate indifference to his safety and health, as outlined in Plaintiff’s first claim. See id. at 3.  
21 The Court otherwise found Plaintiff’s complaint deficient. See id. at 3-5. After Plaintiff failed to  
22 file an amended complaint to address the defects identified by the Court, the Court issued  
23 findings and recommendations that this action proceed against Defendant Martinez on Plaintiff’s  
24 first claim for excessive force and deliberate indifference to his safety and health. See ECF No.  
25 17. Plaintiff did not file objections to the Court’s findings and recommendations, which were  
26 adopted in full by the District Judge on May 23, 2022. See ECF No. 25.

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1 In his motion to dismiss, Defendant Martinez argues that Plaintiff has failed to  
2 state a claim for excessive force. See ECF No. 26-1. Defendant concedes that Plaintiff's  
3 deliberate indifference claim is cognizable, though Defendant denies the claim on the merits. See  
4 id. at 2, n.2. As to Plaintiff's excessive force claim, Defendant argues that the facts alleged fails  
5 to demonstrate deliberate indifference. See id. at 5-6. Specifically, Defendant points to  
6 Plaintiff's allegation that the restraints caught on a bolt on the ground and that Plaintiff's fall was,  
7 therefore, accidental. See id. Defendant also argues that he is entitled to qualified immunity on  
8 Plaintiff's excessive force claim. See id. at 6-8.

9 A review of the docket reflects that Defendant's motion was filed on June 21,  
10 2022, and served on Plaintiff at his address of record. See ECF No. 26-1, pg. 9 (proof of service).  
11 As of August 15, 2022, Plaintiff had not filed an opposition and the Court issued a minute order  
12 advising Plaintiff that the failure to file an opposition could be construed by the Court as consent  
13 to the relief requested in Defendant's motion to dismiss. See ECF No. 27. The minute order  
14 provided Plaintiff an additional 30 days to file an opposition. See id. The minute order was also  
15 served on Plaintiff at his address of record. See id. To date, Plaintiff has not filed any opposition.  
16 The Court agrees with Defendant's analysis and construes Plaintiff's failure to file an opposition  
17 a consent to the relief requested in Defendant's motion. See Local Rule 230(c), (l).

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Based on the foregoing, the undersigned recommends that:

1. Defendant's unopposed motion to dismiss, ECF No. 26, be granted;
2. Plaintiff's excessive force claim against Defendant Martinez be dismissed;

and

3. This action proceed against Defendant Martinez on Plaintiff's deliberate indifference claim only.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: September 26, 2022



DENNIS M. COTA  
UNITED STATES MAGISTRATE JUDGE